

<b>STATE OF SOUTH CAROLINA</b>	)	<b>BEFORE THE CHIEF PROCUREMENT OFFICER</b>
<b>COUNTY OF RICHLAND</b>	)	
	)	DECISION
In the Matter of Protest of:	)	
	)	CASE NO.: 2007-130
Butler Chrysler, Dodge, Jeep	)	
	)	
Materials Management Office	)	POSTING DATE:
IFB No. 08-S7610	)	
Statewide Term Contracts for Vehicles	)	DECEMBER 11, 2007
<u>Pick-Up Trucks and SUVs</u>	)	

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Butler Chrysler, Dodge, Jeep (Butler). With this invitation for bids (IFB), the Materials Management Office (MMO) attempts to procure statewide term contracts for pick-up trucks and SUVs (sports utility vehicles). MMO sought bids for four vehicles: an intermediate, extended cab, flex-fuel 4 x 2 pick up, a ½ ton, extended cab, flex fuel 4 x 2 pick-up, a ½ ton extended cab, flex-fuel, 4 x 4 pick-up, and a intermediate, 4-door, flex fuel, 4 x 2 utility truck. Butler protested MMO's award of item No. 4, a Dodge Durango, to Conway Chrysler, Dodge, Jeep, Inc. (Conway) alleging that "it is obvious that Conway Chrysler selectively has been allowed to withdraw their Dakota bid (Item No. 1) only. They are required to withdraw all or nothing-your rules."

As the issues to be decided here are clear, this decision is prepared without the benefit of a hearing.

#### **NATURE OF PROTEST**

The letter of protest is attached and incorporated herein by reference.

## **FINDINGS OF FACT**

The following dates are relevant to the protest:

1. On August 31, 2007, MMO issued the IFB.
2. On September 12, 2007, MMO issued Amendment No. 1.
3. On September 18, 2007, MMO issued Amendment No. 2.
4. On September 19, 2007, MMO issued Amendment No. 3.
5. On October 2, 2007, MMO opened bids.
6. On October 12, 2007, the CPO received Conway's protest.

## **CONCLUSIONS OF LAW**

On October 2, 2007, Conway submitted a bid for all four items. On October 3, 2007, Steve Hughes, President of Conway, informed Gary Hodgin, MMO Procurement Manager, in a letter that Conway had made a "mistake" in its bid for Item No. 1, the Dodge Dakota. Mr. Hughes wrote:

As you can see when you refer to that page, the Conway Chrysler bid was for the Dodge Dakota vehicle with a bid price of \$14,012.00. The price was mistakenly based on the Dodge Dakota with a six cylinder engine. As you are aware, the specifications for this contract item that appear on solicitation page 14 include a requirement for an eight cylinder engine. The Conway Chrysler mistaken bid price of \$14,012 is well below Conway Chrysler's cost for the vehicle with a specification-conforming eight cylinder engine. Thus, if this mistaken bid price were to remain in effect, and Conway Chrysler were to be awarded a contract for the Dodge Dakota, Conway Chrysler would lose a significant amount of money in fulfilling the ten-vehicle obligation for this contract item.

Mr. Hughes requested that Conway be allowed to submit a corrected bid. MMO denied that request. Alternatively, Conway "ask(ed) that it be allowed to withdraw completely its bid for contract item one (the Dodge Dakota)." Mr. Hughes wrote that if MMO allowed Conway to withdraw its bid for Item No. 1, "the Conway Chrysler bid will consist of bids on contract items 2 through 4."

On October 15, 2007, John Stevens, State Procurement Officer, granted Conway's request to withdraw its bid for Item No. 1. Butler protests MMO allowing Conway to withdraw its bid for one item only arguing that Conway is "required to withdraw all or nothing."

Regarding withdrawal of bids, the Consolidated Procurement code reads, "After opening, bids must not be corrected or withdrawn except in accordance with the provisions of this code and the regulations promulgated pursuant to it. Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts, after award but before performance, must be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency." [11-35-1520(7)] The supporting regulations offer, "A bidder or offeror must submit in writing a request to either correct or withdraw a bid to the procurement officer. Each written request must document the fact that the bidder's or offeror's mistake is clearly an error that will cause him substantial loss. All decisions to permit the correction or withdrawal of bids shall be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency, or the designee of either." [19-445.2085(A)]

Conway's request to withdraw its bid for Item No. 1 was submitted to MMO in writing by Mr. Hughes on October 3, 2007. In it, Mr. Hughes stated that Conway had made a bidding mistake and that Conway would incur a substantial loss [\$939 per vehicle or \$9,390 per year]. The information seems to be substantiated by the fact that Conway's bid for each unit was \$1,650 less than the next lowest bidder.

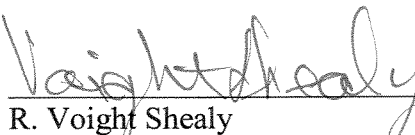
## DETERMINATION

Butler's protest does not contest Conway's withdrawal its bid. Instead, Butler argues that MMO should force Conway to withdraw its bids for all four bid items – all or nothing.

Under many bidding scenarios, the CPO would agree with Butler. For example, if the IFB required bidders to bid all items, Conway could not withdraw its bid for any item without withdrawing its entire bid. Conway's bid would be rejected as nonresponsive. If the IFB had been structured to determine awards based upon items being grouped into lots with a single award for each lot, Conway could not withdraw its bid for any item in a lot without withdrawing its entire bid for that lot. Obviously, if the IFB had been structured to offer a single award for the entire solicitation, Conway could not withdraw its bid for any item without withdrawing its entire bid. In those circumstances, Butler would be correct; Conway would be required to withdraw all or nothing.

However, in this IFB, bidders were not required to bid all items. Instead, bidders could bid the items they chose to compete for. The IFB reads clearly "Offers may be submitted for one or more items." [IFB, p. 10, Offering by Item] and "Award will be made by individual item." [IFB, p. 36, Award by Item] In his written determination allowing Conway to withdraw its bid for Item No. 1 only, John Stevens wrote, "Therefore, the term, "offer" and the term "award" in this case means a single item and not the entire solicitation."

In this case, the CPO agrees. Conway's request to withdraw its bid for Item No. 1 is approved in accordance with SC Code section 11-35-1520(7). The protest is denied.

  
\_\_\_\_\_  
R. Voight Shealy  
Chief Procurement Officer  
for Supplies and Services  
  
12/11/07  
\_\_\_\_\_  
Date

Columbia, S.C.

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of posting of the decision in accordance with Section 11-35-4210(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

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Additional information regarding the protest process is available on the internet at the following web site:  
[www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

**FILE BY CLOSE OF BUSINESS:** Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

**FILING FEE:** Pursuant to Proviso 66.1 of the 2005 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2005 S.C. Act No. 115, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

**LEGAL REPRESENTATION:** In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003). Copies of the Panel's decisions are available at [www.state.sc.us/mmo/legal/paneldec.htm](http://www.state.sc.us/mmo/legal/paneldec.htm)

**Deb Martin - SOLICITATION # 08-S7610**

**From:** "Fleet Sales" <fleetsales@butlerchrysler.com>  
**To:** "CHIEF PROCUREMENT OFFICER" <protest-mmo@mmo.state.sc.us>  
**Date:** 10/12/2007 8:45 AM  
**Subject:** SOLICITATION # 08-S7610  
**CC:** "Allen Register" <ARegister@mmo.state.sc.us>

TO WHOM IT MAY CONCERN,

PLEASE CONSIDER THIS A FORMAL PROTEST OF YOUR INTENT TO AWARD OF THIS SOLICITATION #08-S7610.

FIRST, ON PAGE 5 OF SOLICITATION UNDER "OFFER" YOU STATE "OFFER MEANS PROPOSAL SUBMITTED IN RESPONSE THIS SOLICITATION. THE TERMS "BID AND PROPOSAL " ARE USED INTERCHANGEABLY WITH THE TERM "OFFER"

PAGE 5 ALSO- UNDER BID ACCEPTANCE PERIOD YOU STATE "IN ORDER TO WITHDRAW YOUR OFFER YOU MUST NOTIFY THE PROCUREMENT OFFICER IN WRITING. THIS CLEARLY STATES WITHDRAW YOUR "OFFER" NOT SELECT ITEMS WITHIN THE OFFER .

PAGE 9 -WITHDRAWAL OR CORRECTION OF OFFER- IS GOVERNED BY S.C CODE SECTION 11-35-1520 AND REGULATION 19-445.2085.

SECTION 11-35-1520 STATES UNDER # 7 – CORRECTION OR WITHDRAWAL OF BIDS :  
 "AFTER OPENING, "BIDS" MUST NOT BE CORRECTED EXCEPT IN ACCORDANCE WITH THE PROVISIONS OF THIS CODE".

REGULATION 19-445.2085 CLEARLY STATES :  
 "A BIDDER OR OFFEROR MUST SUBMIT IN WRITING A REQUEST TO EITHER CORRECT OR WITHDRAW A BID TO THE PROCUREMENT OFFICER ".

THE PROTEST IS THE FOLLOWING :

SOLICITATION # 08-7610 IS BY YOUR WRITTEN DESCRIPTION A SEALED OFFER ..  
 IT IS GOVERNED BY S.C CODE 11-35-1520 and REGULATION 19-445.2085.

SECTION 11-35-1520 STATES " BIDS " MUST NOT BE WITHDRAWN EXCEPT IN ACCORDANCE WITH PROVISION OF THIS CODE.

REGULATION 19-445.2085 STATES –A BIDDER MUST SUBMIT IN WRITING A REQUEST TO EITHER CORRECT OR WITHDRAW A BID TO THE PROCUREMENT OFFICER.

THE ISSUE IS ONE CAN NOT WITHDRAW SELECTIVELY ONE OR MORE ITEMS OF AN OFFER/BID/PROPOSAL.  
 IF ONE WITHDRAWS A BID/OFFER IT IS ALL WITHDRAWN (i. e. SOLICITATION #08-S7610) , NOT SELECT INDIVIDUAL ITEMS WITHIN THAT BID/OFFER.

SINCE CONWAY CHRYSLER BID \$ 14,012 FOR DODGE DAKOTA AND \$19,301 FOR DODGE DURANGO, AND BUTLER CHRYSLER, DODGE, JEEP WAS AWARDED DODGE DAKOTA AT \$15,662, IT IS OBVIOUS THAT CONWAY CHRYSLER SELECTIVELY HAS BEEN ALLOWED TO WITHDRAW THEIR DAKOTA BID ONLY .

THEY ARE REQUIRED TO WITHDRAW ALL OR NOTHING-YOUR RULES.

I AWAIT YOUR RESPONSE TO THIS PROTEST AS IT IS CLEARLY VALID ,

SINCERELY,  
CHARLIE HORTON  
FLEET SALES MANAGER  
BUTLER CHRYSLER,DODGE,JEEP